SUPREME COURT, U. S.

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No. 74-93

In the Supreme Court of the United States

OCTOBER TERM, 1973

PAUL BROWN, COMETAS DILANJIAN and THOMAS SHERIDAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioners, Paul Brown, Cometas Dilanjian and Thomas Sheridan, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 3, 1974 affirming the judgment of conviction earlier entered in the United States District Court for the Northern District of Illinois, Eastern Division. A Petition for Rehearing *en banc* was denied on July 25, 1974.

OPINION BELOW

The Opinion affirming this case is not yet reported. It is reproduced as Appendix "A" as is the order denying the Petition for Rehearing *en banc* (both are reproduced as Appendix "A", infra.)

JURISDICTION

The jurisdiction of this court is invoked under Title 28 United States Code, section 1254(1). The order of conviction affirming the District Court was entered on July 3, 1974. The petition for rehearing *en banc* was denied July 25, 1974.

QUESTIONS PRESENTED

Whether a guilty plea conviction and sentence may stand where the plea was (is) attacked on direct appeal as being contrary to Rule 11 Fed.R.Cr.P. i.e., incomplete "factual basis" for accepting guilty plea.

(a) Whether an alleged plea-bargain or agreement reduces the necessity for complete Rule 11 compliance?

(b) Where guilty-pleading indictee is known by the trial court to be a narcotics addict does Rule 11 compel inquiry into whether the indictee is under the influence of narcotics prior to accepting the guilty plea?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

"No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

STATEMENT OF THE CASE

On April 8, 1973 Susan and Mary Prader were arrested by customs inspectors while departing an airplane at Chicago's O'Hare International Airport. Post-arrest they gave statements implicating Brown, Sheridan and Dilanjian (Petitioners herein). The Prader sisters each had a quantity of cocaine on their person at the time of their arrest in Chicago, Illinois.

As a result of the incriminating statements made by the Prader sisters petitioners were indicted (App. C, infra) for violations of 21 U.S.C. 952(a), 959 and 963 (App. D, infra).

On January 16, 1974 petitioners entered guilty pleas in the Federal District Court in Chicago, Illinois. On February 26, 1974 each petitioner was sentenced to three (3) years imprisonment with a special three (3) year parole term to follow. An appeal was prosecuted to the Court of Appeals for the Seventh Circuit and their conviction was affirmed on July 3, 1974. A petition for rehearing with *en banc* suggestions was filed and denied on July 25, 1974.

Each petitioner contests the validity of the guilty plea; i.e., that the guilty plea as to each petitioner was taken in violation of Rule 11, Fed.R. of Crim. Proc. (App. B, infra). In short, each petitioner suggests that the record contained an incomplete factual basis to satisfy Rule 11 requirements. Prior to the guilty plea there was a pre-trial conference and the government indicated to the court that on a plea of guilty to the indictment a three (3) year sentence would be recommended (save for petitioner Sheri-

dan who, because of his military record and additional problems might receive other consideration.[1] Each Petitioner was charged with conspiracy only.

Prior to accepting the guilty plea of each petitioner the trial judge summarized the indictment (Tr. 13; 1/16/74). The court inquired of each petitioner whether they participated in the conversation as specified in overt act 4(a) of the indictment. Each petitioner said yes (Tr. 14; 1/16/74). The court then asked Petitioners Sheridan and Dilanjian whether they gave $1,000 to the Prader sisters as alleged in overt act 4(b) of the indictment. Each said no (Tr. 14; 1/16/74). Thereafter the court inquired as follows:

> "THE COURT: The three men *knew this was happening* or *participating in the conspiracy,* is that correct? (Emphasis ours)
>
> DEFENDANT BROWN: Yes.
>
> DEFENDANT DILANJIAN: Yes.
>
> DEFENDANT SHERIDAN: Yes.
>
> THE COURT: You knew they were going to do this?
>
> DEFENDANT BROWN: Yes.
>
> THE COURT: Maybe you didn't participate in the meetings. Were you in Chicago, the three of you, at the time?
>
> DEFENDANT DILANJIAN: I wasn't, your Honor.
>
> DEFENDANT SHERIDAN: Nor I.
>
> DEFENDANT BROWN: I wasn't here, Judge.
>
> THE COURT: Were you in Mexico?
>
> DEFENDANT SHERIDAN: Yes, sir.
>
> THE COURT: The three of you?
>
> DEFENDANT DILANJIAN: Yes, sir.

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[1] Tr. 11: 1/16/74. Tr. refers to the trial transcript filed in this cause; any Tr. reference will be followed by the date.

THE COURT: You *knew* this was happening? You *knew* that the Stewart girls were bringing the cocaine to the Prader girls and they were taking it into Chicago, is that correct? (Emphasis ours)

DEFENDANT DILANJIAN: Yes, sir.

DEFENDANT SHERIDAN: Yes, sir.

DEFENDANT BROWN: Yes, sir." (Tr. 16, 17; 1/16/74)

No additional inquiries were made by the court to set a "factual basis" for the plea; additionally, nothing further was directed to petitioner Sheridan albeit the court recognized he (Sheridan) had an addiction problem (Tr. 11; 1/16/74).

No plea bargain or agreement was made a part of the record other than to advise each petitioner that the government had recommended a three (3) year sentence were they to plead guilty (Tr. 9, 10, 11; 1/16/74). Each petitioner had been charged in one (1) count, the conspiracy count. No count was dismissed. Petitioners candidly request this court to consider, inter alia, whether this was the "plea-bargain or agreement" envisioned in *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495 (1971). As to petitioner Sheridan the trial court knew he was (is) a narcotic addict; nothwithstanding, no extended inquiry was made by the trial court. As to each petitioner the factual basis for the guilty plea is not reflected in the record, c.f., *Boykin* v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969).

Each petitioner is yet at liberty on bail pending disposition of this Petition for Writ of Certiorari.

REASONS FOR GRANTING WRIT

This direct appeal provides the proper vehicle for a plenary and final examination and determination of what a federal trial court must do to comply with Rule 11. Yet further a resolution is needed so that the several federal circuits have a realistic guideline to follow in narcotic type guilty plea cases. In *U.S.* v. *Thomas,* 468 F.2d 422 (10th Cir., 1972) that court reversed a guilty plea conviction and sentence because the trial court made no explanation as to the nature or context of conspiracy. In the case at bar the sole inquiry made by the trial court was whether petitioners knew the cocaine was coming into Chicago. Clearly, knowledge does not make one a conspirator, *U.S.* v. *Falcone,* 311 U.S. 205, 61 S.Ct. 204 (1940). The Circuits are not in accord as to what constitutes a factual basis. *U.S.* v. *White, et al.,* 483 F.2d 71 (5th Cir., 1973) reversing guilty plea convictions for no factual basis as per Rule 11 (ante, 72, 73); *U.S.* v. *Cody,* 438 F.2d 287, (8th Cir., 1971) reversing federal gun convictions based on guilty pleas for no factual basis as per Rule 11.

In the case at bar the trial judge never explained to these first offenders what constituted a conspiracy although this court has found that:

> "Conspiracy charges frequently are of broad and confusing scope . . . and especially misleading to a layman are the overt act allegation of a conspiracy. Such charges are often, as in this indictment, mere statements of past associations or conferences with other persons, which activities apparently are entirely harmless standing alone. . ." (*Von Moltke* v. *Gillies,* 332 U.S. 708, 68 S. Ct. 316 (1948).

The factual basis for the plea must be developed "on the record", *Santobello* v. *New York,* ante. In the case at bar the factual basis does not comport to the Rule 11 decisions of this court, *McCarthy* v. *U.S.,* 394 U.S. 459, 89 S.Ct. 1166 (1969), *Boykin* v. *Alabama,* ante, *Santobello* v. *New York,* ante.

This case provides the perfect vehicle for a total resolution by this court of Rule 11 requirements as they may or may not relate to plea bargains or agreements and what inquiries must be made by the trial judge when a guilty pleading defendant is a known narcotic addict (as with the instant petitioner, Sheridan, where no inquiry was made).

In *Hayes* v. *U.S.,* 305 F.2d 540 (8th Cir., 1962) the Court of Appeals while vacating a kidnapping conviction and remanding the cause to determine whether the defendant was under the influence of narcotic drugs during his trial opined:

> "It is hardly necessary to add that certainty as to the lack of any mental effects from drugs upon a defendant in his trial and conviction is a matter of particular judicial solicitude. Cf. Pledger v. United States, 4 Cir., 272 F.2d 69, 70." 305 F.2d at 543.

ARGUMENT

In *U.S.* v. *Thomas,* 468 F.2d 422 (10th Cir., 1972) that Court of Appeals reversed a guilty plea to a similar federal narcotics violation stating:

> "No explanation was made to him concerning the nature of the conspiracy charge and there was no indication that Chapman was fully aware of what constituted a conspiracy . . ." (468 F.2d at 426, 427) [2].

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[2] In *Thomas,* ante, a footnote followed the quoted portion citing, inter alia, *McCarthy* v. *U.S.*

The trial court in the case at bar never explained the nature of the conspiracy charge nor did any petitioner expressly understand what is (was) a conspiracy. The denial of committing an overt act is tantamount to an express lack of understanding. The reading or summarizing of an indictment is hardly sufficient to satisfy Rule 11 (*U.S.* v. *Cody*, ante, *Majko* v. *U.S.*, 457 F.2d 790 (7th Cir., 1972)). To summarize an indictment, absent explanation is hardly different. In short, the court apparently felt that so long as petitioners knew of the three (3) year recommendation by the government that complete Rule 11 inquiry was less than necessary. Such can hardly be the case. This court has judicially noted that over 90 percent of all federal criminal cases are disposed of by guilty plea, *Santobello* v. *New York*, ante, at 498. Such being the case this court must finally make direction to the District Court judges that total Rule 11 compliance is mandated notwithstanding the simple fact that a defendant has knowledge as to what an intended sentence will be; were it otherwise Rule 11 becomes utterly unnecessary. If the knowledge of sentence to be imposed is the pivotal element in a guilty plea then why have Rule 11? If this court feels such be the case, so sayeth. If this court is otherwise inclined, then vacate and remand this conviction with directions that petitioners plead anew, *McCarthy* v. *U.S.*, ante. In passing this court might note that the predicate for affirming this conviction appears to be an unreported opinion from the Seventh Circuit in a cause entitled *Moody* v. *U.S.*, No. 73-1853, May 22, 1974. *Moody* as yet is without publication. A reading of *Moody* (App. E, infra) reflects that the Seventh Circuit reviewed his 2255 Petition and found that no plea bargain existed; further the trial judge in *Moody*, ante, questioned *Moody* extensively as to the facts in his

narcotic case as well as total and complete inquiry as to whether he *(Moody)* while entering his plea was under the influence of narcotics or alcohol and specifically found he was not. If any case provides a good "Rule 11 adherence" *Moody* did, this case does not.

CONCLUSION

The record in the case at bar provides no realistic factual basis for sustaining the convictions and sentences in this case. Conspiracy was never explained to these petitioners. The petitioner Sheridan was a narcotic addict at the time of his guilty plea. The court made absolutely no independent inquiry as to whether Sheridan was (is) under the influence of narcotics at either the plea or sentencing. If ever a plea vacation was warranted, this be the case.

Respectfully *submitted,*

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